

# **JUVENILE JUSTICE SEMINAR**

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## **JUVENILE APPELLATE PROCESS: From Special Actions to Appeals to Petitions for Review**

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## I. JUVENILE APPEALS

Go-to statute and rules:

- A.R.S. § 8-235;
- Rules 103-108, Rules of Procedure for the Juvenile Court.

### A. WHO Can Appeal

A.R.S. § 8-235 (A): *Any aggrieved party* in any juvenile court proceeding under this title may appeal from a final order of the juvenile court to the court of appeals in the manner provided in the Arizona rules of procedure for the juvenile court as adopted or approved by the Arizona supreme court.

See also Juvenile Rule 103(A)(any aggrieved party may appeal from a final order of the juvenile court to the court of appeals).

#### 1. “Any Aggrieved Party”

To qualify as an aggrieved party, “the judgment must operate to deny the party some personal or property right or to impose a substantial burden on the party.” *In re Reymundo F.*, 217 Ariz. 588, 590, n. 1 (App. 2008), citing *Pima County Juv. Action No. B-9385*, 138 Ariz. 291, 293 (1983). This juvenile’s parent if the parent is ordered to pay restitution. *In re Kory L.*, 194 Ariz. 215, 217, ¶ 3 (App. 1999) (mother of juvenile ordered to pay restitution is an aggrieved party and may appeal the restitution order). The State is also an aggrieved party because the lower courts’ rulings, if incorrect, impose a substantial burden upon the State. *In re Frank H.*, 193 Ariz. 433, 435, ¶ 8, 973 P.2d 1194, 1196 (App. 1998).

- **Practice Tip:** The State, as “any aggrieved party” has the same appeal rights as the juvenile. In criminal prosecutions, the State is statutorily limited. See A.R.S. § 13-4032 governing criminal appeals; the State may only appeal: (1) an order dismissing an indictment, information or complaint or count of an indictment, information or complaint; (2) an order granting a new trial; (3) a ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment; (4) an order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim’s request; (5) a sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A; (6) an order granting a motion to suppress the use of evidence; (7) a judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

### B. WHAT May be Appealed

A.R.S. § 8-235 (A): Any aggrieved party in any juvenile court proceeding under this title may appeal from a *final order* of the juvenile court to the court of appeals in the manner provided in the Arizona rules of procedure for the juvenile court as adopted or approved by the Arizona supreme court. See also Juvenile Rule 103(A)(any aggrieved party may appeal from a final order of the juvenile court to the court of appeals).

## **1. “Final Order”**

The “final order” is the disposition order because it is the one that disposes of all issues before the juvenile court. But where restitution remains at issue, the final order is the restitution order; until that order has been entered, no appeal may be taken. And, when the notice of appeal is filed, it encompasses all previous orders entered by the juvenile court. *In re Eric L.*, 189 Ariz. 482, 483- 484 (App.1997). Until the court can determine the amount due as restitution through evidence submitted by a victim, it cannot enter its final order. Therefore, the court may impose a reasonable deadline within which restitution claims must be filed. *In re Alton D.*, 196 Ariz. 195, 197, ¶¶ 9-10 (2000). While it is preferable to order restitution as part of the disposition, a juvenile court may hold restitution open beyond the disposition hearing by setting a later, reasonable deadline by which restitution claims may be made or are thereafter barred. But issuance of a separate restitution order is an exception permitted only by court-ordered extension. *In re Michelle G.*, 217 Ariz. 340, 343, ¶ 11 (App. 2008).

The juvenile court's order denying the State's discretionary transfer request does not finally dispose of the delinquency proceeding and is not a final order of the juvenile court. Thus, the proper way for the State to seek appellate review of the court's order denying transfer is to file special action proceedings. *State ex rel. Romley v. Superior Court*, 170 Ariz. 339, 341 (App. 1991). However, the juvenile court's order transferring a juvenile for adult prosecution is a final order. See *State v. Marks*, 186 Ariz. 139 (App. 1996).

Absence of an appealable minute entry order or written order of disposition by the Juvenile Court means there is no appealable order over which the COA can assert jurisdiction. *Matter of Appeal in Maricopa County Juvenile Action No. J-79149*, 25 Ariz. App. 78, 78–79 (1975). If the order is not a final order, the appeal is premature. And, if the appeal is not timely filed, the COA has no jurisdiction. *Jared P. v. Glade T.*, 221 Ariz. 21, 24, ¶ 14 (App. 2009).

- **Practice Tip:** When an appeal is timely filed from a proper final order, appellate jurisdiction is mandatory, unlike petitions for special action or petitions for review, which are discretionary. If you really want an answer from the COA, it is best to try to get the issue in an appeal posture if possible.

## **C. WHEN to Appeal / Cross Appeal**

Timing is everything!

### **1. Rule 104: Time for Taking Appeal**

Under Juvenile Rule 104(A):

- A notice of appeal shall be filed with the clerk of the superior court no later than *15 days* after the final order is *filed with the clerk*.
- A notice of cross-appeal shall be filed with the clerk of the superior court no later than *10 days* after the filing of a notice of appeal.
- A final order shall be *in writing* and *signed by the judge* before an appeal can be taken. The final order shall be by minute entry or separate written order. Filing with the clerk shall take place *when the clerk affixes a file stamp* or otherwise marks the date of filing on the signed minute entry or separate written order, or separately memorializes the date of filing in the clerk's official records. *See Matter of Appeal in Maricopa County Juvenile Action No. J-79149, 25 Ariz. App. 78, 79 (1975)* (in order for there to be a valid final order there must be a minute entry reflecting the disposition action taken by that court, and not a mere initialing of approval on a referee's report).

➤ **Practice Tips:**

- The clock starts ticking as soon as the juvenile court clerk files a written, signed, final order. The timing can vary with the judge and the clerk. Be sure to stay on top of this, or else your appeal will be dismissed for lack of jurisdiction.
- Normally the COA will dismiss an untimely filed appeal on its own, but when you are the appellee, be sure to check for the timeliness of defense appeals and move to dismiss the appeal if the notice was not timely filed or not taken from a final order.
- Filing a motion to reconsider will NOT extend or stay the time limit to file a notice of appeal. *State v. Zuniga*, 163 Ariz. 105 (1990). The right to appeal is strictly statutory, and an order denying a motion to reconsider is not an appealable order. Further, filing a motion affecting an appealable order does not extend the time for filing an appeal from that order, in absence of a rule so providing. *State v. Limon*, 229 Ariz. 22, 23, ¶¶ 4-6 (App. 2011). The applicable rules do not so provide, as explained below.

## **2. No Extensions for Filing Notice of Appeal**

Juvenile Rule 103(C): The appellate court shall give the appeal precedence over all other actions except extraordinary writs or special actions. For good cause, the appellate court, on motion of a party or on its own initiative may suspend, supplement, or vary the requirements of any section of Rules 103 through 108, and may substitute any other appropriate order of proceedings; provided, however, that *the time specified in Rule 104(A) for the filing of a notice of appeal or notice of cross-appeal may not be shortened or extended*, except as provided in Rule 108(B). *See also* A.R.S. § 8-235(C) (the court of appeals shall give the appeal precedence over all other actions except extraordinary writs or special actions).

Juvenile Rule 108(B): Any requests for extensions of time for filing pleadings, motions, or other documents with the clerk of the superior court under the provisions of Rules 103 through 105 of these rules shall be made to the presiding judge of the juvenile court and shall be governed by the provisions of Rule 6(b), Ariz. R. Civ. P.; provided, *however, that the time specified in Rule 104(A) for filing a notice of appeal or cross-appeal may not be extended*, but where the failure to timely file was the result of excusable neglect, the juvenile court may excuse the untimely filing upon motion made after the expiration of the specified period.

➤ **Practice Tips:**

- The “procedural device for delayed appeals is not available to the State because determinable and speedy finality is an important constitutional and public policy consideration in favor of defendants in criminal prosecutions.” *State v. Limon*, 229 Ariz. 22, 23, ¶ 6 (App. 2011). Speedy finality is even more emphasized in juvenile delinquency matters; if you are the State, be timely.
- Once you file a notice of appeal, the juvenile court loses jurisdiction over the matter being appealed. However, it is possible to both file a motion to reconsider and also preserve your right to appeal by filing your notice of appeal and then asking the COA to stay the appeal and revest jurisdiction in the juvenile court to rule on the motion to reconsider:
  - See Juvenile Rule 103(F): During the pendency of an appeal, the juvenile court may proceed within its legal authority on an issue remaining before it or newly presented to it to the extent (1) the appellate court has specifically authorized or directed the juvenile court to rule on the issue.

If succeeding on the motion to reconsider will obviate the need for the appeal, this is a good route to take. However, this is unlikely to be granted if the appellee objects, so be sure to reach out to defense counsel and see if he or she will agree. If the ruling is clearly wrong it saves time and resources; plus, it gives the judge a chance to save face rather than be reversed on appeal. Also, if you lose, it adds to the record on appeal, which may be helpful.

## **D. Stay of Juvenile Court Orders Pending Appeal**

### **1. Stays**

Juvenile Rule 103(B): The order of the juvenile court shall not be suspended or the execution thereof stayed pending the appeal except the appellate court may suspend or stay the execution thereof provided suitable provision is made for the care and custody of the child.

- In exercising its discretion hereunder, the appellate court may consider the likelihood that the order on appeal will be reversed, the best interests of the child, and any other pertinent legal or equitable questions.
- If restitution is ordered to be paid, monies paid for restitution shall be held by the clerk of the superior court from which the appeal is filed pending the final outcome of the appeal.

See also A.R.S. § 8-235(B) (“The order of the juvenile court shall not be suspended and the execution of the order shall not be stayed pending the appeal, except that the appellate court may, by order, suspend or stay the execution of the order if suitable provision is made for the care and custody of the juvenile.”)

- **Practice Tips:** This comes into play when, for example, the issue on appeal is whether the court erred in ordering sex offender registration and the juvenile wishes to stay that order pending the outcome of the appeal. To oppose the stay, argue that the order is unlikely to be reversed on appeal, victim’s rights, public safety, etc., depending on your facts and the issue raised.

## **2. When the Juvenile Court May Proceed**

Juvenile Rule 103(F): During the pendency of an appeal, the juvenile court may proceed within its legal authority on an issue remaining before it or newly presented to it to the extent

(1) the appellate court has specifically authorized or directed the juvenile court to rule on the issue;

- **Practice Tip:** For example, to rule on a motion to reconsider.

(2) the juvenile court’s ruling on the issue would be in furtherance of the appeal;

(3) applicable statutory law or judicial rule confers continuing jurisdiction on the juvenile court;

(4) the juvenile court’s ruling on the issue would not legally or practically prevent the appellate court from granting the relief requested on appeal; or

(5) the issue arises from a motion to dismiss the appeal filed by the appellant and presented to the juvenile court for ruling at a time *before* the clerk of the superior court forwards the record to the appellate court pursuant to Rule 105(D).

This rule shall not be interpreted to authorize the juvenile court to extend the time for filing briefs, motions, transcripts, or other documents or items with the clerk of the court of appeals or the supreme court.

## **E. Appellate Counsel**

Under Juvenile Rule 103(D): When required by law, the presiding judge of the juvenile court shall appoint an attorney for a party to an appeal from a final order of the juvenile court. Unless the presiding judge of the juvenile court finds on motion or on its own initiative that a party who had appointed counsel before the juvenile court is currently able to employ counsel, that party may continue with appointed counsel on appeal without further authorization, subject to substitution of new appointed counsel in the discretion of the presiding judge of the juvenile court. A party who did not proceed with appointed counsel in the juvenile court may seek to proceed with appointed counsel on appeal by filing in the juvenile court no later than 5 days after service of the notice of appeal a request for appointment of counsel on appeal. If the presiding judge of the juvenile court finds that the party is not entitled to proceed with appointed counsel, the party may petition the appellate court to so proceed upon the docketing of the appeal. See also A.R.S. § 8-



235 (D)( judge of the juvenile court shall appoint an attorney for an indigent party appealing a final order of the juvenile court and a reasonable sum shall be fixed by the court to be paid by the county to the attorney for the appeal).

- This does not include the parents of a juvenile who are ordered to pay restitution. *In re Kory L.*, 194 Ariz. 215, 218, ¶ 6 (App. 1999).
- Under Juvenile Rule 103(E), no bond shall be required in any court in connection with an appeal from a final order of the juvenile court.

## **F. Form: HOW to Appeal**

### **1. ARCAP**

Juvenile Rule 103(G): To the extent that they are not inconsistent with or expressly varied by these rules, the following rules in the Arizona Rules of Civil Appellate Procedure (ARCAP) shall apply to appeals from final orders of the juvenile court: Rules 2 (Definitions), 4 (Filing Documents with an Appellate Court; Format; Service), 5 (Computing and Modifying Deadlines), 6 (Motions), 8(g) (Joint or Consolidated Appeals or Cross-Appeals); 11, (d), (e) and (h) (Narrative Statement, Agreed-Upon Statement, Multiple Appeals from the Same Judgment), 17 (Supplemental Citation of Legal Authority), 18 (Oral Argument in the Court of Appeals), 20 (Notice of Decisions and Orders), 24 (Appellate Court Mandates), 25 (Sanctions), 26 (Voluntary Dismissal), 27 (Substitution of Parties), and 28 (Decisions; Publication of Opinions). ARCAP 25 shall not apply to permit the imposition of sanctions against a juvenile appellant or cross-appellant or counsel for a juvenile appellant or cross-appellant for filing a frivolous appeal from a final order in a delinquency or transfer matter.

- Note: ARCAP is your default, not the criminal rules.
- The juvenile rules / ARCAP also govern dependency appeals, which frequently include multiple parties, GALs, etc., that do not factor into delinquency appeals.

### **2. Captioning**

Juvenile Rule 103(A): In an appeal from a final order of the juvenile court in a delinquency, incorrigibility, or transfer matter, the notice of appeal shall be captioned using the first name and last initial of the minor child involved, as follows: “In re Abcde F.”

- Note: Under Juvenile Rule 106(H): Appellate briefs shall use a victim identifier in place of the victim's name in any case in which a delinquent act is alleged against a juvenile for an offense listed in A.R.S. Title 13, chapters 14, 32, 35, or 35.1 or in which the victim was a juvenile at the time of the offense. For purposes of this rule, “victim identifier” means a victim's initials, a pseudonym, or other substitute for the victim's true full name.

### **3. Specify Party Appealing and Order Appealed**

Juvenile Rule 104(B): The notice of appeal or notice of cross-appeal shall specify the *party* taking the appeal or cross-appeal, *designate the final order or part thereof appealed from*, and in the case of appeal by a non-governmental party, state whether the

party was proceeding with appointed counsel in the juvenile court when the final order was filed.

- **Practice Tip:** The remainder of the rule below does not apply to the State, but check to see if defense has complied and if not, bring it to the juvenile court's attention:  
When the appellant is represented by counsel, the notice of appeal or cross-appeal shall contain the following statement: "By signing and filing this notice of appeal, undersigned counsel avows that [he/she] communicated with the client after entry of the judgment being appealed, discussed the merits of the appeal and obtained authorization from the client to file this notice of appeal." If counsel for a party files a notice of appeal or cross-appeal that does not contain the required statement, the clerk of the superior court shall forthwith refer the notice of appeal or cross-appeal to the judge assigned to the case in the juvenile court. Upon receiving the referral, the assigned judge shall promptly issue an order *striking the notice of appeal or cross-appeal* and directing the clerk of the superior court not to process it under rules 104 and 105 of these Rules.

#### **4. Service on Parties and Court Reporters**

Rule 104(C)(1): Within two business days following the filing of a notice of appeal, the clerk of the superior court (juvenile court) shall serve copies of the notice of appeal on all *parties* or their counsel; on each certified *court reporter* who reported any juvenile court proceeding that is part of the certified transcript as defined by subsection (D)(2) of this rule or the *court's designated transcript coordinator, if the record was made by electronic or other means*, and on the *clerk of the court of appeals*. The clerk of the superior court shall include with the copy of the notice of appeal served on the clerk of the court of appeals a *copy of the order from which the appeal is taken* and the names of the persons who were sent a copy of the notice of appeal.

- **Practice Tip:** Sometimes there is a delinquency and a dependency matter regarding the same juvenile, and dependency matters often include parties who are not involved in the delinquency appeal and/or who may not wish to participate in a dependency appeal. Rule 104(C)(2) functions to clarify who is participating in the appeal and will thus receive the record and further orders from the COA regarding the appeal, as follows:  
No later than 10 calendar days after the clerk of the superior court has served copies of the notice of appeal pursuant to subsection (C)(1) of this rule, any party to the proceeding from which the appeal arises or any fiduciary who appeared in the proceeding on behalf of a party thereto may file with the clerk of the superior court and serve on all persons on whom service was made under subsection (C)(1) of this rule a notice stating that the party or fiduciary does not intend to participate actively in the appeal and instead adopts and agrees in advance to be bound by the appellate positions, filings, representations, actions, and omissions of another party or parties, who shall be specifically identified. A notice under this subsection

may not be used or relied upon as a substitute for a notice of appeal, notice of cross-appeal, petition for review, or cross-petition for review. By filing a notice under this subsection, a party or fiduciary does not waive the right to continue to receive service of orders, notices, or other documents issued by the juvenile court or the appellate court, or motions, briefs, notices, or other documents filed by any other party in connection with the appeal. Filing a notice under this subsection does not relieve a party or fiduciary of the obligation to serve upon the remaining parties, or other persons or entities entitled by law or court rule to receive them, any motions, briefs, notices, or other documents filed by the party or fiduciary in the juvenile court or the appellate court in connection with the appeal.

## **5. Presumptive Record on Appeal**

Under Rule 104(D)(1): The record on appeal to the appellate court shall consist of:

- (a) a certified copy of the transcript;
- (b) a certified copy of all pleadings, orders, and other documents filed with the clerk of the superior court;
- (c) the originals of all paper, book, binder, and photographic exhibits of manageable size introduced into evidence; and
- (d) documents and other items added pursuant to subsections (E) or (F)(I) of this rule.

Notwithstanding the preceding provisions of Rule 104(D)(1), the record on appeal shall not include any document or other item deleted pursuant to Rule 104(E).

- **Practice Tips:** Juvenile court files are very different from criminal court files. The juvenile court maintains one delinquency file for the same juvenile throughout his or her minority, which includes all delinquency and incorrigibility petitions and proceedings against that juvenile. If the juvenile has been charged numerous times, it could be a very large file. For such a juvenile, not all items in the file are going to be relevant on appeal. This is why it is important to designate the record, as discussed below. However, sometimes these older adjudications are relevant, especially if it is an appeal of a particular disposition, for example, commitment or sex offender terms of probation / registration. In such cases, previous adjudications, violations of probation, etc., are relevant because the court considers a juvenile's history in making a disposition.

### **i. Legal File v. Social File**

The record referred to in Rule 104(D)(1) refers to the legal file and does NOT include the social file, also known as the "red file" maintained by the probation department. Rule 19, Rules of Procedure for the Juvenile Court provides:

#### **A. Contents of Juvenile Court Files.**

1. Legal File. The legal file of the juvenile court shall consist of all pleadings, motions, minute entries, orders, or other documents as the court may order. The legal file shall be open to public inspection without order of the court, except upon a finding by the court of a need to protect the welfare of the victim, another party or a clear public interest in confidentiality. The court shall state its reasons for withholding the legal file, or portions thereof, from public inspection.

2. Social File. The social file shall be maintain by the probation department and may consist of all social records, including diagnostic evaluations, psychiatric and psychological reports, treatment records, medical reports, social studies, child protective services records, police reports, predisposition reports, detention records, and records and reports or work product of the probation department for use by the court in formulating and implementing a rehabilitation plan for the juvenile and his or her family. The social file of the juvenile shall be confidential and withheld from public inspection except upon order of the court.

See *also* A.R.S. § 8-208 (Juvenile Court Records, Public Inspection; Exceptions)

➤ **Practice Tips:**

- Although it is not actually part of the record on appeal, for many years the COA and all parties received copies of the red file as a matter of course. The contents of the red file include predisposition reports and various evaluations which are very important to the disposition of a juvenile case, and also provide facts about the offense that may not be in the legal file if there was a change of plea. Thus, when I designated my record as either appellant or appellee, I always requested the red file be included in the record on appeal. (Especially since as the appellee, you may have no idea what issues will be presented.) However, last year the AG's office informed MCAO that in fact, the red file is no longer being sent to the COA and the juvenile court cannot release the red file without a court order under Rule 19 as well as a protective order sealing the records from public inspection.
- Juvenile trial attorneys normally get the items in the red file relevant to the delinquency proceedings, including disposition reports, MCIs, and psychological evaluations. Thus, if you want something in particular to be included, see if it is in your juvenile trial file and then designate each item you want included and the reason you want it included. The juvenile court should order that these items be filed with the COA under seal.
- Be especially careful about including mental competency reports; these reports are not necessarily in either the legal or the social files. If this is the case, you and defense counsel may need to prepare a stipulation to include the missing reports, and ask that the reports be filed under seal.

See Juvenile Rule 105(G): The appellate court, on motion or on its own initiative, may direct the transmission of any document, exhibit or other item necessary to determining the appeal and not transmitted under Rule 105(D).

- Take home lesson: As the appellant, think very carefully about what you will need to make your argument on appeal, and be sure these documents will be included in the record on appeal. As the appellee, as soon as you get a notice of appeal make sure that your juvenile trial file is complete; if you were not the trial attorney, be sure to obtain the complete juvenile trial file. If the trial file is missing documents, track them down. In my experience, you can usually get a copy of the probation file documents from the probation officer if they were provided to the juvenile trial attorney as a matter of course.

## **6. Certified Transcript**

Under Juvenile Rule 104(D)(2) the certified transcript shall consist of the following:

- (a) in a delinquency or incorrigibility appeal, the adjudication and disposition hearings and any separate restitution hearing;
- (b) in a transfer appeal, the probable cause and transfer phases of the transfer hearing;
- (c) in a dependency matter, the contested dependency, report and review, or other hearing that generated the order being appealed;
- (d) in a guardianship or termination of parental rights (severance) appeal, the contested guardianship or termination or other hearing that generated the order being appealed; and
- (e) in an adoption appeal, any hearing on the validity of a parent's consent to adoption and any final adoption hearing.

Notwithstanding the preceding provisions of Rule 104(D)(2), the certified transcript shall not include any proceeding or portion thereof excluded pursuant to Rule 104(E).

- **Practice Tip:** If the order you are appealing concerns something other than the trial, change of plea, or disposition hearing, you will need to request additional transcripts. For example, evidentiary hearings, suppression hearings, competency hearings, advisory hearings, restitution hearings, even pretrial conferences if what was said is relevant to the issue on appeal.
  - If you did not handle the juvenile court proceedings yourself, be sure to confer with the trial attorney to determine which hearings might be important to transcribe.

## **7. Designation of Record**

Rule 104(E): No later than *five days* after filing the notice of appeal the appellant may file with the clerk of the superior court and serve a pleading entitled “designation of record”

- (1) requesting that the clerk of the superior court *add* to the record on appeal specifically identified subpoenas or praecipes, or specifically identified studies, reports or medical or psychological evaluations, or compilations of such studies, reports or evaluations, prepared as required by statute, court rule or order for the use of the juvenile court in the proceedings resulting directly or indirectly in the order from which the appeal is taken and not otherwise part of the record;
- (2) requesting that the clerk of the superior court *delete* from the record specifically identified items otherwise automatically included in the record on appeal; and
- (3) requesting that one or more certified court reporters or the court's designated transcript coordinator, if the record was made by electronic or other means, *add to the transcript any proceeding or part thereof not automatically included*, and to *exclude* from the transcript any portion thereof otherwise automatically included.

The appellant shall serve the designation of record on *all parties*, on *each court reporter* who reported a designated portion of the proceedings, and on the court's designated *transcript coordinator*, if the record was made by electronic or other means.

- **Practice Tip:** If the issue is limited, for example, a legal issue that is not fact-dependent, then it is a good idea to exclude what you do not need, especially if it is a voluminous file or lengthy transcript. Note that the State must pay for the transcripts when it appeals. Also, it is just less stuff to sort through.

## 8. Supplemental Designation of Record

Rule 104 (F)(1): No later than *12 days* after the filing of the notice of appeal any appellee may file with the clerk of the superior court and serve a pleading entitled “supplemental designation of record”

- (1) requesting that the clerk of the superior court add to the record on appeal specifically identified subpoenas or praecipes, or specifically identified studies, reports or medical or psychological evaluations, or compilations of such studies, reports or evaluations, prepared as required by statute, court rule, or order for the use of the juvenile court in the proceedings resulting directly or indirectly in the order from which the appeal is taken and not otherwise part of the record, or any specifically identified items deleted by appellant's designation of record; and
- (2) requesting that one or more court reporters or authorized transcribers add to the transcript any proceeding or part thereof deleted by appellant's designation of record or not automatically part of the transcript as defined in Rule 104(D)(2).

The supplemental designation of record shall be served *on all parties and on each affected court reporter and authorized transcriber.*

- **Practice Tip:** This can be sticky for the appellee, as at this point you may have no idea what the appellant will raise on appeal and so cannot know what, exactly, you will need in order to file an answering brief. Because of the priority given to juvenile appeals, including short deadlines and the limited number of extensions (one, if you are lucky), it might be problematical to ask that items be added to the record or that additional transcripts be prepared when the deadline for your answering brief starts to run. BUT, you cannot simply guess or take a “just in case” approach:
  - See Juvenile Rule 104(G): “No party shall request that any item be added to the record, or any proceeding to the transcript, *that is not essential to deciding the issues presented by the appeal.* For any infraction of this rule, the appellate court *may impose sanctions* pursuant to ARCAP 25 made applicable in juvenile appeals by Rule 103(G).”

Thus, if you discover you need additional items after receiving the opening brief, move for their inclusion. Point out the short timeline provided under Rule 104(F)(1) for supplementing your record at a time when did not know what the issues on appeal would be, as well as the risk of sanction under Rule 104(G), and avow that your request is in good faith.

- See Juvenile Rule 105(G): The appellate court, on motion or on its own initiative, may direct the transmission of any document, exhibit or other item necessary to determining the appeal and not transmitted under Rule 105(D).
- You might have to move to extend time to file an answering brief in light of that request, especially if you need an additional transcript. However, if you have the missing items in the juvenile trial file, you could proceed with your answering brief and cite the items you wish to include with a footnote indicating that you have filed a motion for their inclusion along with your answer brief. This demonstrates good faith by showing why the items are important to your argument, and you have not used your request to delay the proceedings by seeking an extension.

## **9. Disputes about the Record**

Rule 104(F)(2): If any dispute arises about whether the record discloses what actually occurred in the juvenile court, it shall be submitted to and resolved by the juvenile court. If anything material to any party to the appeal is omitted from or misstated in the record, the parties by stipulation, the juvenile court, either before or after the record is transmitted to the appellate court, or the appellate court on motion or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions concerning the form and content of the record shall be presented to the appellate court.

## 10. Court Reporters

Juvenile Rule 104(H): The court reporter or reporters or authorized transcribers shall prepare the original certified transcript and one copy for each party to the appeal who has not filed a notice pursuant to subsection (C)(2) of this rule promptly upon receiving a notice of appeal filed by a governmental entity or a notice of appeal stating that the appellant was proceeding with appointed counsel in the juvenile court when the final order that is the subject of the appeal was filed.

Juvenile Rule 104(I) No later than five days after the filing of the notice of appeal or five days after the denial of a request to proceed with appointed counsel, an appellant who is not proceeding with appointed counsel *shall make arrangements with the certified court reporter or authorized transcriber to pay for the transcript*. The certified court reporter or authorized transcriber shall immediately notify the appellate court in writing if an appellant fails to make satisfactory arrangements within the prescribed time. When satisfactory payment arrangements are made, the certified court reporter or authorized transcriber shall promptly prepare the certified original transcript and one copy for each party to the appeal who has not filed a notice pursuant to subsection (C)(2) of this rule.

Juvenile Rule 104(J): An appellant who is not proceeding with appointed counsel on appeal shall pay for all portions of the record on appeal that he has designated or requested, and for those portions of the record on appeal that are required under subsections (D)(I) and (2) of this rule and not deleted by a party.

- **Practice Tip:** When the State appeals, it pays for the transcripts. Thus, be sure to get approval from your office before proceeding with an appeal that will result in such costs. The State need not make satisfactory arrangements, see Rule 105(B)(1), below.

## 11. Docketing

Juvenile Rule 105(A): The clerk of the court of appeals shall docket the appeal *upon receipt of the notice of appeal and the order from which the appeal is taken*. A juvenile appeal shall in the alternative be docketed on the filing with the clerk of the court of appeals of a motion seeking to suspend or stay the juvenile court's order pending resolution of the appeal, provided the motion makes an appropriate showing that a timely notice of appeal was filed in the juvenile court and that the order from which the appeal is taken was final and appealable. The clerk of the court of appeals shall determine and establish the official caption of the appeal pursuant to the criteria set forth in Rule 103(A) for captioning the notice of appeal. After the appeal has been docketed, the clerk of the court of appeals shall send notice to all parties and the clerk of the superior court of the date on which the appeal was docketed.



Juvenile Rule 105(B): The court reporter or reporters or authorized transcriber shall file the completed certified transcript with the clerk of the court of appeals, marked with the number assigned to the appeal by the court of appeals, no later than:

- (1) 30 days after the filing of a notice of appeal by a governmental agency or of a notice of appeal stating that appellant proceeded with appointed counsel in the juvenile court when the final order that is the subject of the appeal was filed, or
- (2) 30 days after service of an order of the presiding judge of the juvenile court appointing counsel to represent the appellant on appeal, or
- (3) 30 days after the appellant makes satisfactory arrangements to pay for the certified transcript, whichever event first occurs. At the time of filing the certified transcript, the court reporter or reporters or authorized transcriber shall serve one copy of the certified transcript on each appellant and each appellee who has not filed a notice pursuant to 104(C)(2).

The court reporter or reporters or authorized transcriber shall contemporaneously file notice of service of the certified transcript with the appellate court, reflecting when, upon whom, and by what means service was made. Service of certified transcript copies shall be made in the manner prescribed by any applicable local rule or administrative order, or otherwise in accordance with the prevailing custom in the juvenile court from which the appeal originates.

Juvenile Rule 105(C): If the certified transcript is not timely filed with the clerk of the court of appeals, *the noncomplying court reporter or reporters or authorized transcriber shall be subject to such orders or sanctions as the court of appeals deems appropriate in its discretion.*

- **Practice Tip:** Be sure to keep track of the transcript due dates. Find out the contact information for the head court reporter or electronic transcriber in your county, and reach out to them when you do not timely receive a transcript. Filing a motion to extend time to file an opening brief because you have not timely received a transcript despite good faith efforts to obtain it from the court reporter will get the COA's attention.

Juvenile Rule 105(D): No later than 20 days after the notice of appeal is filed, the clerk of the superior court shall

- prepare a certified copy of the pleadings, orders, and other documents filed with the clerk of the superior court except for subpoenas or praecipes not added to the record pursuant to Rule 104(E) or (F), and documents deleted from the record pursuant to Rule 104(E), and individually number each document copy on the first page thereof in filing-date order beginning with the first such item to be filed;
- (2) identify and assemble the original documentary and electronic exhibits in the record that are of manageable size, including those added to the record pursuant to Rule 104(E) or (F) and excluding those deleted from the record pursuant to Rule 104(E);
- (3) prepare a single index of the record on appeal separately listing (a) the document copies prepared pursuant to subsection (1), in numerical order,

indicating for each the title or a brief description of the item and the date of its filing with the clerk of the superior court, if any, (b) the exhibits identified and assembled pursuant to subsection (2), by number, with a brief description of each and the date, if any, when it was admitted into evidence;

- (4) transmit the copies and exhibits and the index thereof to the clerk of the appellate court; and
- (5) serve copies of the index on all parties to the appeal.

Juvenile Rule 105(E): Upon receipt, the clerk of the court of appeals shall file each portion of the record on appeal. *The clerk of the court of appeals shall send notice to all parties of the date on which the record on appeal is complete.*

- **Practice Tip:** The opening brief is due within 20 days after notice that the record is complete. Normally, the COA will provide the due date for the opening brief, which may be slightly longer than 20 days. Sometimes the appellee will object that the opening brief was untimely filed when filed in accordance with that later date. Extensions are governed by ARCAP Rule 5 via Juvenile Rule 103(A).

Juvenile Rule 105(F) The clerk of the superior court shall immediately forward to the clerk of the court of appeals certified copies of minute entry orders and instruments that are filed with the clerk of the superior court after initial transmission of the record on appeal to the court of appeals, marked with the number assigned to the appeal by the court of appeals.

Juvenile Rule 105(G) The appellate court, on motion or on its own initiative, may direct the transmission of any document, exhibit or other item necessary to determining the appeal and not transmitted under Rule 105(D). See p. 14, last full paragraph.

## 12. Service

Juvenile Rule 108(A): Unless otherwise specified, any pleadings, motions, notices, or other documents required to be filed under any provision of Rules 103 through 105 of these rules shall be filed with the *clerk of the superior court* and a *copy thereof lodged with the presiding judge of the juvenile court*. Whenever under Rules 103 through 107 service of pleadings, motions, notices, or other documents filed with the clerk of the superior court or the appellate court is required or permitted, such service shall be made in accordance with the provisions of Rule 5(c), Ariz. R. Civ. P.

- **Practice Tip:** The notice of appeal and cross-appeal, designation of record, and related pleadings must be filed in the juvenile court and a copy lodged with the presiding juvenile court judge. However, briefs and motions directed to the COA are filed with the clerk of the COA via Turbofile.
- Civil Rule 5(c)(2) provides options for service such as hand-delivery and mailing; however, most courts now do electronic filing with instantaneous delivery. With Turbofile, every party will get an email from the COA with a link to the pleadings.

But you should also send courtesy copies to opposing counsel via email when the pleadings are filed. Be mindful of how the means of delivery may affect your due date.

### **13. Extensions**

Juvenile Rule 108(B): Any requests for extensions of time for filing pleadings, motions, or other documents with the clerk of the superior court under the provisions of Rules 103 through 105 of these rules shall be made to the presiding judge of the juvenile court and shall be governed by the provisions of Rule 6(b), Ariz. R. Civ. P.; provided, however, that *the time specified in Rule 104(A) for filing a notice of appeal or cross-appeal may not be extended*, but where the failure to timely file was the result of excusable neglect, the juvenile court may excuse the untimely filing upon motion made after the expiration of the specified period.

- **Practice Tips:** The procedural device for delayed appeals is not available to the State. *State v. Limon*, 229 Ariz. 22, 23, ¶ 6 (App. 2011).
- Motions to extend directed to the COA under Rules 106-107 are governed by ARCAP Rule 5 via Juvenile Rule 103(A).

### **14. Briefing**

#### **i. Word Limits**

Juvenile Rule 106(A): ARCAP 13 and 14 shall apply in appeals from final orders of the juvenile court, except that

- (1) briefs submitted in hard copy shall be bound or fastened in the top margin by a two-pronged fastener and need not have covers; no adhesive bindings or bindings using numerous holes shall be used;
- (2) a principal brief prepared in a proportionately spaced typeface may not exceed **7,000 words**, and a reply brief so prepared may not exceed **3,500 words**; and
- (3) a principal brief prepared in a monospaced typeface may not exceed 20 pages, and a reply brief so prepared may not exceed 10 pages.

The word and page limits specified in this subsection *do not include the table of contents, table of citations, certificate of service, certificate of compliance, and any appendix*. If a brief is filed electronically, and if the appendices contain multiple documents, such documents shall be electronically bookmarked in the appendices' table of contents. The appellate court may strike a brief that does not substantially conform to the requirements of this rule.

- See ARCAP Rule 13, Content of Briefs, incorporated under Juvenile Rule 106, for the structure required in opening, answering, and reply briefs, including table of contents, table of citations, etc.

#### **ii. Argument**

ARCAP Rule 13(A)(7), incorporated under Juvenile Rule 106, requires an “argument” that must contain:

(A) Appellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies. The argument may include a summary.

(B) For each contention, references to the record on appeal where the particular issue was raised and ruled on, and the applicable standard of appellate review with citation to supporting legal authority. If a ruling challenged on appeal is one that required a party's objection at trial to preserve a right of review, such as a failure to admit or to exclude evidence or the giving of or refusal to give a jury instruction, appellant must include a reference to the record where the objection and ruling are located.

- **Practice Tips:** In your brief, be sure to provide adequate support for every argument you make. The appellate courts generally decline to address issues that are not argued adequately, with appropriate citation to supporting authority. *In re J.U.*, 241 Ariz. 156, 161, ¶ 18 (App. 2016), citing: ARCAP Rule 13(a)(7) (requiring appellant's brief to contain supporting legal authority and reasons for each contention); Juvenile Rule 106(A) (applying ARCAP 13 to juvenile appeals); *State v. Bolton*, 182 Ariz. 290, 298 (1995) (claims waived for insufficient argument on appeal). *See also State v. West*, 238 Ariz. 482, 492, ¶ 27 (App. 2015). If there is no supporting argument or authority accompanying an issue, the issue is waived. *AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4 (App. 1995).
- When you are the appellee, be sure to point out the appellant's arguments that lack adequate support either in the record or substantively. Be mindful that defense may still have their argument considered if the error was fundamental, so address fundamental error.

### iii. Time Limits

Juvenile Rule 106(B): ARCAP 15 shall apply in appeals from final orders of the juvenile court, except that

- appellant's opening brief shall be filed with the clerk of the court of appeals within *20 days after the clerk sends the notice required by Rule 105(e)*;
- (2) each appellee shall file an answering brief with the clerk of the court of appeals within *20 days after service of the appellant's opening brief*;
- (3) appellant may file a reply brief within *10 days after service of appellee's answering brief, or appellant may file a notice stating that no reply brief will be filed*; and
- (4) the appeal will be deemed “at issue” upon the filing of the reply brief, upon the filing of a notice that no reply brief will be filed, or 10 days after service of the answering brief, whichever first occurs.

- **Practice Tip:** You can keep track of the status of your appeal on the COA's website. After the briefing is completed, it will say the case is "at issue." Normally it takes six months or less to get a decision. However, sometimes the COA will neglect to timely make a decision; it is a good idea to tickle your appeals files periodically and make sure you do not have a "sleeper." Once, I discovered a sleeper that had not been decided over a year after the briefing was complete. *In re Tiffany O.* A simple suppression issue on a *Terry* search. I filed a motion asking the COA to decide the appeal as it appeared that the case had slipped between the cracks. And when I finally got the decision, it was 45-page opinion, published on Christmas Eve; while the appeal was in limbo, *Gant* was decided. It was not pretty.

#### iv. Amicus Briefs

Juvenile Rule 106(C): ARCAP 16 shall apply in appeals from final orders of the juvenile court, except that briefs *amicus curiae* submitted in hard copy shall be bound or fastened in the top margin by a two-pronged fastener and need not have covers. No adhesive bindings or bindings using numerous holes shall be used. A brief *amicus curiae* shall not exceed 6,000 words if prepared in a proportionately spaced typeface or 18 pages if prepared in a monospaced typeface, exclusive of pages containing the table of contents, the table of citations, certificate of service, certificate of compliance, and any appendix.

#### v. Dismissal for Want of Prosecution

Juvenile Rule 106(E) The appellate court, *upon motion of the appellee, or upon its own initiative after notice to all parties, may dismiss an appeal for any legal cause including want of prosecution*, unless an affected party makes a showing of good cause why the appeal should not be dismissed. The clerk of the court of appeals shall give prompt notice of dismissal of an appeal to the parties, the clerk of the superior court, and if the certified transcript has not yet been filed, to the appropriate court reporter or reporters or the court's designated transcript coordinator.

- **Practice Tip:** Another reason to tickle your pending appeal files, as both appellant and appellee. As appellant, be sure to timely file an opening brief. If you must, file a motion to extend. They are not favored in juvenile appeals, but for good cause you can usually get one 20-day extension. Juvenile appeals take precedence over all other matters; unless they are special actions, pleading more urgent deadlines in criminal cases will not be helpful.

#### 15. Disposition of Appeal

Juvenile Rule 106(F): Upon consideration of the appeal, the appellate court may:

- Affirm the action of the juvenile court; or
- (2) Reverse and remand for appropriate action by the juvenile court; or
- (3) Take the matter under advisement and order the filing of additional matters in the appellate court; or

- (4) Take such other actions as to the court may appear just and proper under the circumstances.

## 16. Anders Appeals

Juveniles may file Anders briefs, just as in criminal court. See *Anders v. California*, 386 U.S. 738 (1967); *Maricopa County Juvenile Action No. JV-117258*, 163 Ariz. 484 (App. 1990). When this happens, no answering brief is required unless the COA directs that one be filed. When the COA does so, it normally identifies the issues it wishes addressed. Unless this happens, your job is to babysit the appeal until the COA disposes of it.

- **Practice Tip:** There is no *Anders*-hybrid type of brief. *State v. Scott*, 187 Ariz. 474, 478 (App. 1996). When an advocate's brief has been filed on behalf of a defendant, the appellate court presumes that counsel has raised all arguably meritorious issues and will not search the record for fundamental error. *Id.*; *State v. Banicki*, 188 Ariz. 114, 118 (App. 1997). Thus, be sure to file a motion to strike an opening brief that appears to both present issues for review and seeks review for fundamental error. Be wary of Anders briefs with “stealth” issues, where issues are “suggested” but not argued. It is either / or, not the best of both worlds.

## G. SUBSTANCE: WHY to Appeal

### 1. Strategy: To Appeal or Not to Appeal.

- Choose your battles wisely. Be mindful of the maxim that bad facts make bad law.
- If you anticipate filing multiple special actions and/or appeals on a particular recurring issue that either your office or the defense wishes to appeal, you want to present a consistent argument in each case; you never know which case will result in an opinion. Create a trial memorandum or stock response to defense motions raising the issue, and file them in every case so that the argument is in the record. However, unless the issue is purely legal and not fact-dependent, consider your facts and make sure it makes sense to make the argument in the context of your particular case. If it is sketchy and your case is the one that results in an opinion, it might not be the opinion you were hoping for. Optimally, your facts should not only support the argument, but have a bit of policy “sex appeal.” A case where clearly the outcome will be absurd or will be harmful to the victim or the interest in public safety, judicial economy, and so forth. Always think policy, ask what if the trial court is right, what does that mean? Point out the implications. But do not jump on the “me too” bandwagon if your case is just not the “poster child” case for the argument.
- Sometimes your best fix is legislation, not litigation.
  - Example: Before direct file, transfer was required to get any serious cases before the adult criminal court. At one point juvenile court judges started

granting lengthy continuances at the conclusion of transfer hearings to see how the juvenile would behave; in effect, deferring the transfer decision in order to consider actions and behavior occurring after the transfer hearing. I filed a special action and the COA granted relief, holding that the juvenile rules provide for speedy justice and there was no authority to defer the transfer decision. Victory was short-lived, however; ASC then drafted a juvenile court rule providing for deferred transfer, and then we began a campaign to have it found unconstitutional on the basis of the doctrine of separation of powers. I developed a legal memorandum objecting to the court using the rule, it was filed in every case where it was used, and then I filed multiple special actions. ASC ultimately heard oral argument but then decided review had been improvidently granted. It was finally fixed via the legislature; now, by statute the transfer decision cannot be deferred.

- Note that the COA will usually affirm the trial court if it can, and thus being the appellant is not the position of strength. Sometimes it is best to wait for the defense to appeal after you won the issue in the trial court, rather than appealing after you lose yourself.
- Appeal issues do not begin at the appellate level. Think through the implications of how to charge the case, how to try the case, the sort of plea agreements to offer. If any link is weak, it could result in an appellate opinion that will affect prosecutors all over the state.

## **2. Making a Record**

- The success of an appeal is very much dependent on the record; when appearing before the juvenile court, always be mindful of the record you are creating.
- Evidence that is not in the record cannot be considered. Thus, be sure to admit all evidence that connects the dots to support the adjudication, suppression hearing, disposition, transfer hearing, etc. *See In re Maricopa County Juvenile Action No. J-74449A*, 20 Ariz. App. 249, 251 (1973) (in a contested dependency hearing the petitioner must introduce evidence adequate to sustain its burden of showing dependency and thus may not rely upon any documentary reports, files or records which have not been admitted into evidence).
- When filing a notice of appeal, consider your designation of record very carefully. When you receive the record from the COA, check to make sure all relevant evidence and pleadings were transferred as part of the record to the court of appeals.
  - Case law: It is the duty of counsel who raises objections on appeal to see that the record contains the material to which they take exception. When matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court. *State v. Geeslin*, 223 Ariz. 553, 554, ¶ 5 (2010), *citing State v. Zuck*, 134 Ariz. 509,

513 (1982). See also *State v. Villegas-Rojas*, 231 Ariz. 445, 446, n. 1 (App. 2012). As a consequence, when a non-indigent criminal appellant fails to arrange and pay for transcripts, or other portions of the record, the excluded material cannot be subject to fundamental-error review. *State v. Mendoza*, 181 Ariz. 472, 474 (App. 1995). See also *State v. Huffman*, 169 Ariz. 465, 467 (App. 1991) (failure to provide COA with transcript of proceedings in limine required COA to presume the record supported trial court's decision to deny defendant's motion); *State v. Suarez*, 137 Ariz. 368, 379 (App. 1983) (where not transcript was prepared, COA had to presume the record of State's motion to continue trial court's granting the continuance and therefore conclude the State made a showing of extraordinary circumstances existed and that delay was indispensable to interests of justice); *Maricopa County Juvenile Action No. J-74449 A*, 20 Ariz.App. 249, 251 (1973) (party who questions the sufficiency of evidence has the burden of including the transcript of testimony in the record so as to provide a basis for review; in the absence of such transcript, COA will presume the evidence sustains the court's findings and affirm).

- In the trial court, raise every argument you may wish to raise on appeal or special action, and make it with a bit of substance; cite a case, a rule, a statute, to preserve your argument on appeal. State your objections clearly and ask the trial court to let you make your record orally. If you did not flesh out your argument or if the court cut you off, file a motion or a memorandum right after the hearing to get the argument in the record. Any argument not raised below is deemed waived on appeal. Do so in a timely manner, not as an afterthought. A kitchen sink approach is not always appropriate, but when you are on shaky ground, it is helpful to preserve as many arguments on appeal as possible. Also be sure to call out opposing counsel if their brief fails to do so.
  - Case law:
    - The appellate court generally does not consider objections raised for the first time on appeal. This is particularly so when the issue relates to the alleged lack of detail in the juvenile court's findings. A party may not sit back and not call the trial court's attention to the lack of a specific finding on a critical issue, and then urge on appeal that mere lack of a finding on that critical issue as a grounds for reversal; such an argument is waived. *Christy C. v. Arizona Dept. of Econ. Sec.*, 214 Ariz. 445, 452, ¶ 21 (App. 2007).
    - A party must make a specific and timely objection at trial to the admission of certain evidence in order to preserve that issue for appeal. A general objection, such as "irrelevance," will not be sufficient to preserve the issue for appeal. Further, an objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds. *State v. Hamilton*, 177 Ariz. 403, 408-409 (App.1993). See also *State v. Lopez*, 170 Ariz. 112, 118 (App.1991) (objections to insufficient foundation and form of the question failed to preserve on appeal issue that testimony was beyond scope of permissible expert testimony); *State v. Hernandez*, 170 Ariz. 301, 306-07 (App.1991) (hearsay objection



did not preserve issue that testimony violated confrontation clause); *State v. Miller*, 173 Ariz. 421 (App. 1992) (failure to object to the imposition of statutorily permissible fine at sentencing waives the objection on appeal absent fundamental error).

- Defense arguments not raised in the trial court are reviewed only for fundamental error. *State v. Urrea*, 242 Ariz. 518, ¶ 9 (App. 2017), citing *State v. Brown*, 233 Ariz. 153, ¶ 12, (App. 2013). See also *State v. Veloz*, 236 Ariz. 532, ¶ 12 (App. 2015) (claim that statute is unconstitutionally vague and overbroad reviewed only for fundamental error if not raised before trial court); *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (objection on one ground does not preserve issue on another ground); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (fundamental error waived if not argued); *State v. Lefevre*, 193 Ariz. 385, 389, ¶ 15 (App. 1998) (normally, failure to raise a claim at trial waives appellate review of that claim, even if the alleged error is of constitutional dimension). For error not raised in the trial court to qualify as fundamental error, the error must be clear, egregious, and curable only via a new trial. *State v. Gendron*, 168 Ariz. 153, 155 (1991).
- Waiver aside, note that if the trial court's decision can be supported on any ground, it will be affirmed.

Case law:

- Failure to argue a claim usually constitutes abandonment and waiver of that claim. At the same time, the appellate court is obliged to uphold a trial court's ruling if legally correct for any reason. The appellate court may employ its discretion when determining whether to address a significant, albeit waived, issue. *State v. Snyder*, 240 Ariz. 551, 557, ¶ 25 (App. 2016) (choosing to address inevitable discovery exception given its constitutional nature and the trial court's reliance on it).
- An appellate court is required to affirm a trial court's denial of a motion to suppress if legally correct for any reason and, in doing so, the appellate court may address the state's arguments to uphold the court's ruling even if those arguments otherwise could be deemed waived by the state's failure to argue them below. Additionally, waiver is a procedural concept that the court does not rigidly employ in a mechanical fashion, and the court may use its discretion in determining whether to address issues not raised below. *State v. Boteo-Flores*, 230 Ariz. 551, 553, ¶¶ 7-8 (App. 2012), citing See *State v. Kinney*, 225 Ariz. 550, n. 2 (App. 2010). See also *State v. Herrera*, 232 Ariz. 536, 543, ¶ 14 (App. 2013) (because trial court admitted the other-acts evidence as intrinsic, it had not addressed argument that evidence also was admissible under Rule 404(c); therefore, a limited remand was appropriate to permit trial court to consider admissibility of the evidence under Rule 404(c) and allow COA to determine on review whether the admission of the evidence was legally correct). This holds true even if the issue is fact-intensive, as long as the State is presenting an argument to uphold the court's ruling and the factual record developed at the

suppression hearing is sufficient for appellate review. *Hernandez*, 242 Ariz. 568, n. 6.

- Motions to reconsider are a good idea to flesh out your argument after a ruling. If it is granted, there is no need to appeal; if it is denied, the argument is in the record. This is especially true if the ruling is not the final order. However, as explained above, a motion to reconsider a final order will NOT extend time for filing a notice of appeal; you must file the motion and the notice of appeal at the same time and then ask the COA to stay the appeal and remand to the juvenile court for ruling.

## **H. Petitions for Review - Appeals**

### **1. Time**

Juvenile Rule 107(A):

Any party may, *within 30 days* after the clerk of the court of appeals has given notice that a decision or final order disposing of the appeal has been rendered, file with the clerk of the supreme court a petition for review of the case. *No motion for reconsideration in the court of appeals shall be permitted.*

A *cross-petition* for review may be filed with the clerk of the supreme court *within 15 days* after service of a petition for review.

### **2. Format**

Juvenile Rule 107(B):

The petition for review and cross-petition for review shall comply with the provisions of ARCAP 4(b) unless such requirements are otherwise suspended. The parties shall be designated as in the court of appeals.

*A copy of the decision of the court of appeals* shall accompany the petition.

Except by permission of the court, (1) a petition for review or cross-petition prepared in a proportionately spaced typeface may not exceed *3,500 words* and may not have an average of more than 280 words per page, including footnotes and quotations.

- **Practice Tip:** Normally, less is more. However, sometimes the argument simply cannot be made in 3,500 words, especially if the opinion is a very lengthy one. In such instances, you can file a motion to exceed word limitations, explaining why the extra length is necessary.

The petition for review or cross-petition shall contain concise statements of the following:

- 1. The issues that were decided by the court of appeals and that the petitioner wishes to present to the supreme court for review. The petitioner shall also list, *separately and without argument*, any additional issues that

were presented to but not decided by the court of appeals and may need to be decided if review is granted.

- 2. The facts material to a consideration of the issues presented to the supreme court for review with appropriate references to the record on appeal. No evidentiary matter shall be included unless material to a proper consideration of the issues presented, in which instance a reference shall be made to the record or page of the certified transcript where such evidence appears.
- 3. The reasons why the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the supreme court should be overruled or qualified, that conflicting decisions have been rendered by the court of appeals, or that important issues of law have been incorrectly decided.
- 4. If the record on appeal contains documents that are necessary for a determination of the issues raised by the petition or cross-petition, the petitioner or cross-petitioner shall file, simultaneously with the petition or cross-petition, an appendix that contains only those documents.
  - **Practice Tip:** If ASC grants review, it will have access to the entire record. (See Rule 107(F)). However, you first have to persuade them to grant review. Think through the documents that will be necessary to support your arguments and also persuade ASC to grant review. Further, even if ASC has access to the record later, it is always best to introduce the critical documents early on and make it easy for the justices to access them. But do not overdo, eyeballing an enormous tome will not make your petition very inviting.
- The clerk of the supreme court may in his or her discretion return to the petitioner or cross-petitioner any petition for review or cross-petition for review presented for filing that does not substantially comply with this rule. The clerk of the supreme court shall include with the returned petition written instructions to the petitioner or cross-petitioner to file a proper petition or cross-petition within 30 days from the date on which the clerk of the supreme court sends the written instructions to the petitioner or cross-petitioner.

### **3. Underlying Briefs**

Juvenile Rule 107(C): When the clerk of the court of appeals is notified that a petition for review has been filed, the clerk shall make available to the clerk of the supreme court the briefs filed in the court of appeals.

- ASC will have access to the briefs filed in the COA, so there is no need to provide a copy or present a reformatted version of your underlying brief. However, you might incorporate parts of it by reference.

#### **4. Service and Response**

Juvenile Rule 107(D):

The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition and any appendices on all parties who have appeared in the court of appeals.

Any party wishing to oppose the petition or cross-petition may file with the clerk of the Supreme Court a response within *30 days* from the date upon which the petition or cross-petition for review is served.

The response shall comply with the provisions of Rule 107(B) and ARCAP Rule 6(c) not otherwise suspended by any Administrative Order of the Supreme Court. If the record on appeal contains documents that are necessary for a determination of the issues raised by the petition or cross-petition, the respondent shall file, simultaneously with a copy of the response, an appendix that complies with the requirements set forth in paragraph (B) of this rule and contains only those documents not included in the appendix filed with the petition or cross-petition.

- **Practice Tip:** As respondent, think through which documents to include in any appendix to your response. In this posture, you want to show ASC why they need not grant review. This is your chance to complete the picture presented by the petitioner; do not include documents already provided by the petitioner.

Failure to file a response shall not be considered an admission that the petition or cross-petition should be granted.

- **Practice Tip:** No response is required, but it is a good idea to file a “Notice of Acknowledgement” stating that you received the petition and do not intend to file a response. That way, the court need not wait until your time to respond before proceeding with its decision to grant review. However, only do this if you are pretty sure review will be denied. When there are concurring and/or dissenting COA opinions, you should file a substantive response.

If a response is filed, it shall list, separately and without argument, any additional issues not listed by the petitioner or cross-petitioner that were presented to but not decided by the court of appeals and may need to be decided if review is granted.

- **Practice Tip:** If you feel the need argue such issues, you should probably be filing a cross-petition for review. However, if you have won below you may not wish to challenge the opinion and “snatch defeat from the jaws of victory.”

*No reply shall be filed by petitioner or cross-petitioner, unless the supreme court has so directed by specific order, in which event a reply may be filed within the time set by the supreme court.*

## **5. Review Granted / Additional Briefing**

Juvenile Rule 107(E): If the supreme court grants review, its order shall specify the issue or issues to be reviewed. The supreme court *may order that the parties file additional briefs or that oral argument be heard, or both.* If the order granting review does not provide for supplementation of briefs or for oral argument, *either party may, within 15 days after the clerk sends notice of the court's order, request the court to do so by a motion specifying the reasons for supplementation or for oral argument, or both.*

Juvenile Rule 107(F): Upon notification by the clerk of the supreme court that a petition for review or cross-petition for review has been granted, the clerk of the court of appeals *shall make the remaining record available to the clerk of the supreme court.*

## **6. Review Denied**

Juvenile Rule 107(G): If the supreme court denies review, its order shall specify those justices of the supreme court, if any, who voted to grant review. When all petitions and cross-petitions for review have been decided, the clerk of the supreme court shall so notify the clerk of the court of appeals and the parties, and shall return any original paper copies of the briefs to the clerk of the court of appeals. Unless permitted by specific order of the supreme court, no party shall file a motion for reconsideration of an order denying a petition for review or cross-petition for review.

## **7. Mandate**

Juvenile Rule 107(H): The mandate shall issue out of the court of appeals in the manner and at the times provided in this rule.

- If there has been no petition for review, the clerk shall issue the mandate at the expiration of the time for the filing of a petition for review.
- If a petition for review is filed, the mandate shall not issue until the receipt by the clerk of an order of the supreme court denying the petition for review, at which time the clerk will issue and forward the mandate.
- If the petition for review is granted by the supreme court, the mandate shall issue out of the supreme court. Any exhibits or other objects transmitted as originals by the clerk of the superior court to the appellate court shall be returned with the mandate to the clerk of the superior court. Any papers, exhibits or other objects which were transmitted as certified copies to the appellate court may either be returned with the mandate to the clerk of the superior court, or destroyed pursuant to rule or administrative order of the appellate court.

## **8. Disposition**

#### Juvenile Rule 107(I): Dispositions:

- (1) If an appeal is resolved by agreement of the parties after a petition for review by the supreme court is filed, the supreme court may order that the decision of the court of appeals be vacated, or that any opinion of the court of appeals be redesignated as a memorandum decision.
- (2) When review has been granted, the supreme court may remand the appeal to the court of appeals for reconsideration in light of authority identified in the supreme court's order.
- (3) If issues were raised in, but not decided by, the court of appeals and review has been granted, the supreme court may consider and decide such issues, may remand the appeal to the court of appeals for decision of such issues, or may make such other disposition with respect to such issues as it deems appropriate.

### 9. Extensions

Rule 107(J): Motions to Extend Time. The supreme court shall have authority to grant or deny motions to extend the time to file petitions for review. Motions to extend the time to file petitions for review and cross-petitions for review shall be filed in the supreme court.

### 10. PR Practice Tips:

- Review is discretionary and it is thus important to be persuasive. Tell ASC why they should accept review of your case, tell them why the COA got it wrong, and point out what that means for state trial courts and cases. If you are responding and agree with the outcome in the COA, explain why the COA got it right and the harm in changing that outcome.
- If there are concurring and/or dissenting opinions or there is a conflict on an issue in published opinions as between Division One and Division Two, ASC is much more likely to accept review to resolve the issue on a state-wide level. Be sure to argue the need for such a resolution, and cite conflicting opinions or memorandum decisions. Although memorandum decisions may not be cited as persuasive authority unless within the parameters of Arizona Supreme Court Rule 111(c), in this instance you are not citing them as authority but rather to show conflicting decisions and outcomes in the COA.
- In seeking review, you can ask the ASC to grant relief, or in the alternative, depublish the opinion. That leaves the ruling intact for that particular case, but takes away the precedential authority affecting other cases. *E.g., In re Franklin V.* If it was a memo decision to being with, think twice before doing a PR.
- Cross petitions for review: A cross petition for review is appropriate when you agree ASC should accept review but not for the same reasons as stated by

petitioner. Sometimes neither party is happy; then it is a matter of who filed a PR first. Other times, you may agree with the outcome on one issue, but not another. Also, where there are multiple cases consolidated for appeal, you may want ASC to affirm on some cases but grant review on others. *E.g. Mario W. v. Kaipo*, resulting in two separate concurring and dissenting opinions.

## **I. Motions to Designate as an Opinion**

Under Rule 111(b), Rules of the Supreme Court, a written decision shall be designated as an opinion when the decision:

1. Establishes, alters, modifies or clarifies a rule of law, or
2. Calls attention to a rule of law which appears to have been generally overlooked, or
3. Criticizes existing law, or
4. Involves a legal or factual issue of unique interest or substantial public importance, or if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion.

When you receive a memorandum decision from ASC or the COA that you feel should be designated as an opinion, file a motion citing the above applicable reasons for doing so.

- E.g., *In re Arnulfo G.*, COA memorandum decision holding that prosecution as an adult does not amount to prejudice for purposes of alleged violations of speedy juvenile justice was a memorandum decision that was later designated as an opinion.

## **J. Oral Argument**

ARCAP Rule 18, incorporated under Juvenile Rule 103(G):

(a) Request for Oral Argument. The Court of Appeals may schedule a case for oral argument if a party files a separate request for oral argument no later than 10 days after the due date for the final reply brief, or no later than 10 days after the date the appellant or cross-appellant actually files the final reply brief, whichever is earlier. A party that believes the Court of Appeals should allow extended oral argument must state the reasons as part of the request. If the Court of Appeals grants a request for oral argument, or if the Court of Appeals orders oral argument on its own initiative, the Court of Appeals clerk must notify the parties of the time and place for oral argument, and the allocation of time for each side. The Court of Appeals clerk must provide the notice at least 20 days before the date set for oral argument.

(b) Factors. Notwithstanding a party's request under Rule 18(a), the Court of Appeals may decide an appeal without oral argument if it determines that:

- (1) The appeal is frivolous;
- (2) The Court of Appeals has recently decided another case that is dispositive of the issues presented; or
- (3) The briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court in deciding the appeal.

When a party has made a request under Rule 18(a), the Court of Appeals clerk must give the parties prompt written notice that the Court of Appeals has determined the appeal will be submitted without oral argument.

(c) Amicus Curiae. Amicus curiae may participate in the oral argument only on motion and with the Court of Appeals' permission.

➤ **Practice Tips:**

- Normally parties request oral argument in parentheses underneath the title of their principal brief. (Oral Argument Requested).
- Whether or not oral argument will be granted is anyone's guess; sometimes both parties ask for oral argument but the Court declines, sometimes neither party asks but the Court will set oral argument.
- If oral argument is set, practice, practice, practice your argument!
- Set up a moot court with your colleagues a few days before your argument.
- Do not simply recite your brief; the Court has read the briefs and is looking for something else.
- Prepare an outline of your argument, but be flexible. The Court will ask questions, and not necessarily in the order of your outline. The Court can and will skip around, be able to think on your feet.
- Answer any question right away, do not, under any circumstance, say "I will get to that later in my argument."
- If you do not know the answer, say so.
- ASC has a public outreach program under which it will set oral argument in a venue outside of Phoenix, often in a high school. They almost always include a juvenile appeal for such arguments. I have done oral argument before ASC in high schools in Nogales and Flagstaff.

**K. Supplemental Citation of Legal Authority**

Under ARCAP Rule 17, incorporated under Juvenile Rule 13(G):

(a) When Appropriate. Pertinent and significant legal authority may come to the attention of a party after a party has filed a brief, or after the appellate court has heard oral argument but before entering its decision. In these circumstances, the party may supplement legal authority that the party previously presented in the



party's briefing by filing with the appellate court a supplemental citation of legal authority.

(b) *Form*. A supplemental citation of legal authority must clearly identify the page numbers of the party's brief that the party intends to supplement, and the relevant pages of the supplemental authority. The party must further state concisely, and without argument, the legal proposition supported by a supplemental citation.

- **Practice Tip:** This is appropriate when new case law is decided after filing your brief or after oral argument, or when you overlooked important case law or discover relevant legislative history. Note that you are only providing a citation, maybe a short quote; you may not add any argument.

## II. SPECIAL ACTIONS

There are no special rules for juvenile special actions; look to Rules of Procedure for Special Actions. A special action is extraordinary relief sought against a body, officer or person under circumstances where the interests of the party seeking relief will be irrevocably harmed if relief is not granted right away, as opposed to waiting for review on appeal.

### A. Parties and Other Persons

Rule 2(a) Parties.

(1) *General*. Any person who previously could institute an application for a writ of mandamus, prohibition, or certiorari may institute proceedings for a special action. The complaint shall join as a defendant the body, officer, or person against whom relief is sought. If any public body, tribunal, or officer is named as a defendant, the real party or parties in interest shall also be joined as defendants.

(2) *Victims*. The victim as defined in Rule 39(a), Rules of Criminal Procedure, may institute proceedings for a special action seeking relief from an order denying any right guaranteed to victims under Arizona Constitution Art. 2, § 2.1, any implementing legislation or court rules. Such proceedings may also be instituted by the prosecutor at the request of the victim.

Rule 2(b) Other Persons. The court may direct that notice of the action be given to any person. It may allow other persons to intervene subject to the provisions of Rule 24 of the Rules of Civil Procedure; or may order their joinder as parties; or may allow them to participate *amicus curiae*.

#### ➤ Practice Tips:

- Although normally the respondent is the juvenile court judge who entered the order to be reviewed, the “real party in interest” will be responding, not the respondent judge. Normally, that is the opposing party, either the State

or the juvenile. However, if it is an administrative matter as between the juvenile court and the juvenile, the AG may respond on behalf of the respondent judge. See, e.g., *JV-132324 v. Superior Court In & For County of Maricopa*, 181 Ariz. 337 (App. 1995)(administrative order automatically appointing public defender as counsel of record upon the filing of petitions for delinquency or incorrigibility attempted to effect official blanket appointment of public defender in juvenile cases rather than merely authorizing public defender to conduct conflict checks).

- Where the victim files a special action, determine whether the State's interests are the same as the victim's. If so, you can simply file a joinder with the victim's petition. Be sure to work closely with the victim's counsel in these matters. Sometimes the victim will want to join the State's special action as well.

## **B. Questions Raised**

Under Rule 3, the only questions that may be raised in a special action are:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

- **Practice Tip:** Sometimes all three will apply. However, you must allege at least one of these; special action relief is strictly limited to these questions.

## **C. Procedural Matters**

### **1. Where to File**

Under Rule 4(a), a special action may be brought in ASC, the COA, or the superior court. In juvenile court matters, special actions proceedings are filed in the COA. Sometimes a juvenile will try to file one directly in ASC claiming extraordinary circumstances of constitutional dimensions, but normally ASC will decline to accept jurisdiction if the matter was not first filed in the COA.

### **2. When to File**

While neither the statutes nor the rules governing special actions set any specific deadline for filing a petition for special action, "the 20-day period for taking an appeal will likewise apply [to filing petitions for special action] unless circumstances justifying the delay are shown." *State v. Mahoney*, 25 Ariz. App. 217, 219 (App. 1975)(jurisdiction declined due to 53-day unexplained delay, even though the trial court had erred and petitioner would otherwise have been entitled to relief). In *Cicoria v. Cole*, 222 Ariz. 428, 430, ¶ 8 (App. 2009), the COA deemed it appropriate to consider the timeliness of a special action petition in determining whether to accept jurisdiction and held that without

some explanation, a 4-month delay in seeking special action relief would typically be unreasonable.

- **Practice Tip:** If you can, wait until you have a fully developed record to present. Filing a motion to reconsider and then filing a special action from the denial might help flesh out your argument and give the court a chance to reverse itself. Also, you will need to obtain transcripts of critical hearings, so order them right away and ask for expedited delivery. As with all things juvenile, time is of the essence.

## D. Pleadings

The formal requirements for petitions filed in the COA are under Rule 7.

Under Rule 7(e), the petition and response must comply with ARCAP Rules 4, 4.1, and 4.2.

- The petition or response must include a jurisdictional statement, a statement of the issues, a statement of material facts, and an argument with citations to authorities, statutes and appropriate references to the record.
- A copy of the order being challenged must be attached to the petition.
- All references in the petition or response must be supported by an appendix of documents in the record before the trial court. The appendix must comply with ARCAP Rule 13.1. If the appendix is more than 15 pages, it must be filed separate from the petition or response.
- The petition or response may not exceed *10,500 words*.
- ARCAP Rules apply to special actions.

## E. Service and Response

When a petition for special action is filed, the party filing the petition will receive an order setting dates which will include the time for filing a response, if any, and a possible date for oral argument to be reserved by the parties. Under Rule 7(d):

[T]he petition and all papers shall be served forthwith by the petitioner or the petitioner's agent, and the time and manner in which service shall be made may be specified by the court. Objections to such relief shall be in the form of a written response, and shall be filed and served within *seven days* after service of the petition upon the respondent, or such lesser time as the court shall fix by order. *No reply shall be filed by the petitioner unless ordered by the court*, in which event a reply may be filed within the time set by the court. At the appointed time, if any, the court will hear the parties in order to determine whether jurisdiction shall be accepted. If the court accepts jurisdiction, the court will then render its decision on the merits after submission of such additional memoranda and portions of the record as the court deems appropriate. For cause shown, the appellate court may waive or order acceleration of any or all of the foregoing procedures.

- **Practice Tip:** There is not a lot of time to respond. No response is necessary, and often the COA will decline to accept jurisdiction before you file a response;

infuriatingly, sometimes your response and the COA's order declining to accept jurisdiction will cross in the mail. You can call the clerk of the COA to see if the court has declined to accept jurisdiction or track it very carefully on the website before devoting a lot of time to drafting a response. Use your best judgment here, as you do not want a decision to be made without having any say in the matter. If the COA decides to accept jurisdiction, it may order a response, supplemental briefing, and allow a reply. As with appeals, either party can request oral argument.

## **F. Stays**

Normally the party seeking relief will also seek a stay of the juvenile court's order. Note that the party seeking a stay must ask the juvenile court first, and then file a motion for stay in the COA if the juvenile court denies that request. After filing the request, the party seeking the stay must call the COA to set up a telephonic stay hearing and then notify opposing counsel of the time set. If you are not the trial attorney and the facts are important, you may wish to have the trial attorney handle the telephonic stay hearing since that person will have a better grasp of the factual issues. The reasons for seeking a stay typically are much the same as those for granting relief, so do prepare a short, concise version of your argument, including why the court should accept jurisdiction, or, if you are the respondent, why it should not.

## **G. Jurisdiction**

Special action relief is discretionary; first the COA must accept jurisdiction and only then can it grant or deny relief. Typical reasons to accept jurisdiction include:

- The petitioner has no equally plain, speedy and adequate remedy by appeal.
- The juvenile court's order may cause irreparable harm to the petitioner.
- The special action involves a pure question of law in a matter that is likely to recur.
- The issue is capable of repetition yet evading review.
- Examples:
  - *Otel H. v. Barton*, 208 Ariz. 312, 313, ¶ 4 (App. 2003) (although pre-adjudication detention issue was moot as to juvenile, COA would accept jurisdiction because the petition raised a constitutional question of statewide importance that is likely to recur, and to evade review, until it is resolved in a published opinion).
  - *Juvenile in Mohave County Juvenile Court Cause No. J-96-560 v. Superior Court In & For County of Mohave*, 189 Ariz. 515, 516 (App. 1997) (denial of juvenile's request for peremptory change of judge was appropriate case for exercise of special action jurisdiction).
  - *Alexandria M. v. McClennen*, 216 Ariz. 441, 443 (App. 2007) (COA would exercise its special action jurisdiction to review juvenile court's refusal to conduct an advisory hearing in a delinquency proceeding after the court had found the juvenile incompetent but restorable, where the juvenile did not have a speedy remedy on appeal, the issue the juvenile raised involved the interpretation of rules and a statute, and the issue could recur)

- *Luis A. v. Bayham-Lesselyong ex rel. County of Maricopa*, 197 Ariz. 451, 453 (App. 2000) (exercise of special action jurisdiction was appropriate over consolidated cases raising legal issues about sufficiency of traffic citations to commence juvenile proceedings and right to speedy justice on citations, which were likely to recur and affect many juveniles)
  - *State ex rel. Romley v. Superior Court In & For County of Maricopa*, 172 Ariz. 109 (App. 1992) (special action review of juvenile court order continuing transfer hearing for six months was appropriate, since juvenile court lacked authority to continue hearing, order continuing hearing was not appealable, and juvenile court's authority to order such a continuance was a matter of statewide importance that turned upon a question of law rather than disputed issues of fact)
  - *Mario W. v. Kaipio*, 228 Ariz. 207, 211 (App. 2011), *vacated*, 230 Ariz. 122, ¶ 6, 281 P.3d 476 (2012), *abrogated by Maryland v. King*, 569 U.S. 435, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013) (interpretation of a statute requiring pre-adjudication DNA testing of juveniles charged with certain offenses was a matter of first impression and presented both a pure question of law and a matter of statewide importance).
    - This particular special action consolidated seven cases, and there were far more pending resolution. I spent a couple of months basically doing assembly-line special action responses. The original opinion resulted in two different outcomes, depending on the posture of the case, and there were two separate concurring opinions as well as two separate dissenting opinions – from a panel of 3! This was obviously going to go up to ASC; I did a cross-petition for review. ASC accepted review and then decided something else entirely, which is now arguably abrogated by SCOTUS case law. And, ASC set this case set for oral argument at a high school in Flagstaff.
- **Practice Tip:** Orders granting or denying a motion to suppress or dismiss are typically appropriate for appellate rather than special action review. Note that in criminal cases, the State will dismiss the case without prejudice in order to appeal an order suppressing evidence. In juvenile court, however, typically the suppression hearing is done as part of the trial, meaning jeopardy has attached and you can no longer dismiss the case without prejudice in order to appeal. The juvenile can appeal the denial of the motion to surpass on appeal but of course the State cannot appeal an acquittal after such a motion is granted. Thus, try to have evidentiary hearings separate from the trial if possible to avoid the jeopardy issue. Getting the juvenile court or the COA to stay the proceedings in order to do a special action mid-trial will be very difficult.

## H. Transfer Issues

Under A.R.S. § 13-504, the adult criminal court may transfer to juvenile court a juvenile being prosecuted as an adult per discretionary direct filing under § 13-501(B); such proceedings can originate by motion of the juvenile, or the court's own motion. Be

aware that this statute can lead to some interesting issues. For example, last year, a juvenile who was direct-filed as an adult filed a motion to transfer her case to juvenile court, and the criminal judge transferred the case summarily, without doing the requisite hearing or making the requisite findings. And the judge did so just before the juvenile's 18<sup>th</sup> birthday. I did a petition for special action and request for stay. The COA did not grant the stay, but instead recommended during the telephonic stay conference that we dismiss the juvenile case and charge her anew in criminal court after her eighteenth birthday. However, there was the question of whether the juvenile court even had jurisdiction to dismiss a case that was improperly transferred, and no guarantee the juvenile court would dismiss the case in any event. Thus, the juvenile attorney filed a motion to dismiss the case in juvenile court, preserving the argument that the juvenile court had no jurisdiction to begin with. The juvenile court held oral argument and then dismissed the case. After the juvenile's eighteenth birthday, the COA declined to accept jurisdiction. There was another case where the defendant who had been charged as an adult while still a juvenile filed a petition for special action because the criminal trial court refused to hold a transfer hearing after his eighteenth birthday. The COA declined to accept jurisdiction of that, as well.

### **III. POST-ADJUDICATION RELIEF**

There is no collateral review equivalent to Rule 32 post-conviction proceedings in juvenile court. Rule 32, Ariz. R. Crim. P., does not apply to the juvenile court. *State v. Berlat*, 146 Ariz. 505, 508 (1985). In *Berlat*, ASC explained that neither Criminal Rule 32 nor Civil Rule 60(c) governed a juvenile's right to a delayed appeal; rather, juveniles must seek such relief under Rule 16(a), Rules of the Supreme Court. The Court later promulgated Rule 29, Rules of Procedure for the Juvenile Court, to clarify the juvenile court's authority to consider motions for delayed appeal. *In re Victor P.*, 190 Ariz. 354, 356 (App. 1997); see now Rule 108(B), Rules of Procedure for the Juvenile Court. The juvenile rules do not provide for any other form of relief available under Criminal Rule 32. Thus, in criminal cases ineffective assistance of counsel claims must be raised in Rule 32 proceedings and not on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3 (2002). But in juvenile cases, claims of ineffective assistance of counsel are properly raised on appeal. See *Maricopa County Juvenile Action No. JV-511576*, 186 Ariz. 604, (App. 1996).

Similarly, Criminal Rule 24.1 and 24.2, governing motions for new trial and motions to vacate judgment, do not apply to the juvenile court. In *Maricopa County Juv. Action No. JS-1109*, 26 Ariz.App. 518 (1976), ASC held there are no provisions in the juvenile rules authorizing the filing of a motion for new trial. And in *Yavapai County Juv. Action No. J-9365*, 157 Ariz. 497, 501-02 (App. 1988), the COA held because the juvenile rules do not provide for a motion for new trial, the juvenile's opportunity to attack the juvenile court's findings and their sufficiency lies in his direct appeal.

Between 2005-2009, the COA periodically would suspend a juvenile appeal and remand it to the juvenile court for proceedings akin to Rule 32 to determine claims of ineffective assistance of counsel, and also once to determine a motion for new trial filed under Civil Rule 60. I did several special actions that never went anywhere, including one wherein I filed a special action in ASC against the COA panel that suspended the appeal and remanded it back to the juvenile court for an evidentiary hearing. The only hearing

that was ever held in the juvenile court pursuant to such an order was set just before the juvenile's eighteenth birthday, and the juvenile chose to withdraw his request for obvious reasons. Then it stopped happening. Be aware of this, however, as there are no rules or procedures in place to govern such proceedings and the whole idea of doing Rule 32 proceedings in juvenile court is simply unwieldy. Issues like this tend to come back periodically.